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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ~~78~~-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

vs.

ABRAHAM BENJAMINS, as Personal Representative of the
Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY
AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 6, 1978.

Opinions Below

The majority opinion of the Court of Appeals and the dissenting opinion of Circuit Judge Van Graafeiland are reported at 572 F.2d 913 (2d Cir. 1978) and are printed in the Appendix to this Petition at pages 3a-24a.

The order of the District Court dismissing the Complaint for lack of federal question jurisdiction under 28 U.S.C. §1331 is not reported either officially or unofficially; it is printed in the Appendix at page 25a.

* Joined as respondents pursuant to U.S. Sup. Ct. Rule 21, 28 U.S.C.A.

Jurisdiction

The judgment of the Court of Appeals was entered on March 6, 1978. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by Orders of the Court of Appeals entered on April 27, 1978.¹ The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

This case involves a wrongful death action brought by a Dutch citizen against two British corporations arising out of an airerash which occurred in England. Overruling its own twenty-one year precedent and thereby placing itself in conflict with all other reported cases as well as the long standing views of the Executive Branch of Government, the Court of Appeals has broadened the federal question jurisdiction of the District Courts under 28 U.S.C. §1331 to include all cases involving injury or death of passengers arising out of international transportation by air governed by the Warsaw Convention.² Therefore, the questions presented for review are:

1. Did the United States, in adhering to the Warsaw Convention, intend that Article 17 thereof create a cause of action for wrongful death?

2. Does Article 17 of the Warsaw Convention create a cause of action for wrongful death?

¹ See the Appendix hereto at pages 1a-2a.

² A treaty of the United States. Official title: Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000; T.S. 876 (1934). Herein referred to as either the Warsaw Convention or simply the Convention.

3. Should the federal question jurisdiction of the District Courts be extended to include suits by aliens against aliens arising out of an aviation accident occurring in a foreign country where "international transportation" by air, as defined in the Warsaw Convention, is involved?

4. Should the federal question jurisdiction of the District Courts be extended to include all claims arising from "international transportation" by air where the Warsaw Convention is applicable?

Statutory Provisions Involved

Convention For The Unification Of Certain Rules Relating To International Transportation By Air

Chapter I

Scope—Definitions

Article I

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzer-

ainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

49 Stat. 3014.

. . .

Chapter III

Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3019.

. . .

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Federal Question Jurisdiction

28 U.S.C. §1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended July 25, 1958, Pub.L. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, §2, 90 Stat. 2721.

28 U.S.C. §1331.

Statement of the Case

A. The Facts.

This is a wrongful death action brought by respondent Abraham Benjamins (hereinafter Benjamins) to recover damages for the death of his wife as a result of an accident involving an aircraft of petitioner British European Airways (hereinafter BEA) which occurred shortly after take-off from Heathrow Airport, London, England, on

June 18, 1972. Both BEA and the manufacturer³ of the aircraft involved were joined as defendants in the action below.

Benamins, although a resident of California, is not a citizen of the United States but is a citizen of the Netherlands and was so when the action was commenced. Similarly, his deceased wife was a citizen of the Netherlands at the time of her death. Petitioner BEA and HSA both are corporations organized and existing under the laws of the United Kingdom and have their principal places of business there.

The passenger ticket pursuant to which Benamins' deceased wife was travelling at the time of her death was purchased in Los Angeles and provided for international transportation within the meaning of Article 1 of the Warsaw Convention. It is undisputed that the provisions of the Warsaw Convention apply to the rights of Benamins as against petitioner in this case.

B. Proceedings in the Courts Below.

1. The District Court.

This action was one of several cases filed in various United States District Courts arising out of the same accident, all of which were consolidated in the Eastern District of New York for consolidated and coordinated pretrial and discovery proceedings pursuant to 28 U.S.C. §1407. During discovery regarding Benamins' alleged damages, it was learned that both Benamins and his deceased wife were Dutch citizens and not citizens of the United States.

As the only jurisdictional basis alleged in the original complaint was diversity of citizenship under 28 U.S.C.

³ Hawker Siddeley Aviation, Ltd. and Hawker Siddeley Group, Ltd., herein collectively referred to as HSA. They are joined as respondents herein pursuant to U.S. Sup. Ct. Rule 21, 28 U.S.C.A.

§1332, BEA and HSA moved to dismiss the complaint for lack of subject matter jurisdiction. The motion was granted⁴ and Benamins was given leave to file an amended Complaint asserting federal question jurisdiction. An amended Complaint was then filed alleging as the bases for jurisdiction 28 U.S.C. §§1331, 1337 and 1350.

BEA and HSA moved to dismiss the amended complaint upon the ground that there was no basis for federal question jurisdiction in that the Warsaw Convention did not create a cause of action for wrongful death and the other provisions⁵ relied upon by Benamins as the bases for federal question jurisdiction were not applicable.

Considering itself bound by prior decisions of the Court of Appeals for the Second Circuit, to the effect that the Warsaw Convention does not create a cause of action for wrongful death so as to confer federal question jurisdiction under 28 U.S.C. §1331, the District Court dismissed the amended complaint for lack of jurisdiction in a bench decision, which is printed in the Appendix at pages 26a-29a.

2. The Court of Appeals.

On appeal, Benamins argued that jurisdiction over the amended complaint properly vested in the District Court under both 28 U.S.C. §§1331 and 1350. By a vote of 2 to 1, with a strong dissenting opinion by Circuit Judge Van

⁴ Diversity jurisdiction under 28 U.S.C. §1332 does not exist where both plaintiffs and defendants are aliens. See, *Hodgson and Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807); *Compagnie Nationale Air France v. Castano*, 358 F.2d 203, 206 (1st Cir. 1966); *Kavourgas v. Nicholaou Co.*, 148 F.2d 96 (9th Cir. 1945); *Ex parte Edelstein*, 30 F.2d 636 (2d Cir.), *cert. denied, sub nom., Edelstein v. Goddard*, 279 U.S. 851 (1929); *Dassigienis v. Cosmos Carriers & Trading Corp.*, 321 F.Supp. 1253 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1016 (2d Cir. 1971).

⁵ 28 U.S.C. §1337: Commerce and anti-trust regulation. 28 U.S.C. §1350: Alien's action for tort.

Graafeiland, the Court of Appeals,⁶ overruling its own 21 year precedent, held that Article 17 of the Warsaw Convention does create a cause of action for wrongful death and concluded, therefore, that the District Court did have federal question jurisdiction over the amended complaint pursuant to 28 U.S.C. §1331.⁷ In discarding its own universally accepted precedent, *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957), and thereby placing itself in conflict with all existing precedent, the majority of the Court below stated:

The fact that a proposition of law has been accepted for some twenty years is evidently a sign that circumspection is needed in seeking to overturn that proposition. We recognize that our holdings in *Komlos* and *Noel* have become the rule not of this circuit alone, but of others as well. See, e.g., *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.) cert. denied, 431 U.S. 974, 97 S.Ct. 2239, 53 L.Ed.2d 1072 (1977). Nonetheless, we are convinced that—in light of both the paucity of analysis that accompanied the creation of the rule and the strong arguments in favor of the opposite rule—the *Komlos/Noel* rule ought no longer to be followed.

572 F.2d at 919; Appendix 15a.

The majority of the Court below rejected the clearly expressed view of the Executive Branch of Government that Article 17 merely creates a presumption of liability.⁸

⁶ Per Circuit Judges Lumbard and Feinberg.

⁷ The majority of the Court below agreed with the District Court that jurisdiction could not properly be based upon the Alien Tort Claims Act, 28 U.S.C. §1350. 572 F.2d at 916; Appendix 8a.

⁸ Secretary of State Cordell Hull wrote:

The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on

The majority characterized this view as a “passing remark of Secretary [of State Cordell] Hull in a lengthy letter . . .” 572 F.2d at 919; Appendix 15a.

The only “new authority” relied upon by the majority of the Court below, which was not before the Court of Appeals for the Second Circuit when *Noel* was decided, was (1) an article by G. Nathan Calkins entitled *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217, 319 (1959) and (2) the Multidistrict Litigation Act, 28 U.S.C. §1407. Otherwise, the majority decision rested upon a reexamination of the same treaty provisions that were before the court in *Noel*, and, indeed, the Senate in 1934 when it gave its advice and consent to ratification of the Convention.

In a strong dissenting opinion, Circuit Judge Van Graafeiland stated as to this reappraisal and discarding of the *Noel* rule:

Completely reversing our field, we now hold that Article 17 creates a cause of action for wrongful death. As justification for this turnabout, the majority relies in part upon the “paucity of analysis that accompanied the creation of the rule.” I am at a disadvantage in challenging this statement, because Judge Lumbard, the writer of the majority opinion, also wrote *Noel*. However, I am satisfied that Judge Lumbard gave *Noel* the same careful and thoughtful consideration he gives to every case, and which he has given to this

the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

1934 U.S. Av. R. 239, 243. See, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. (1934).

one. Moreover, I am convinced that the numerous courts who have adopted the reasoning of *Noel*, see, e.g., *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), did not do so without their own thoughtful analysis of its merit. In short, I am constrained to conclude, as Judge Moore did when dissenting in *Lisi v. Alitalia—Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455, 88 S.Ct. 281, 19 L.Ed.2d 276 (1968), that the majority no longer approves of the terms of the Convention and therefore by judicial fiat has decided to rewrite it. In the process, the majority draws within the ever-widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.

A court should proceed cautiously when asked to overturn a well-settled doctrine of law. This is especially true in this case because a sensitive question concerning the scope of federal jurisdiction is involved.

572 F.2d at 920; Appendix 18a.

A Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by Order⁹ dated April 27, 1978.⁹

⁹ Appendix 1a-2a.

REASONS FOR GRANTING THE WRIT

1. The majority decision of the court below overrules the Second Circuit's own 21 year precedent¹⁰ as well as two of its subsequent decisions.¹¹ While the Second Circuit's decision in *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) was not the first case to hold that the Warsaw Convention does not create a cause of action,¹² it is clear that the decision in *Noel* was extremely influential in a large number of subsequent cases.¹³ In fact, since the decision in *Noel*, the courts uniformly have held, in reliance upon *Noel*, that Article 17 of the Warsaw Convention does *not* create a cause of action, but rather, only a presumption of liability on the part of the air carrier.¹⁴

¹⁰ *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

¹¹ *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801-2 (2d Cir. 1971) and *Husserl v. Swiss Air Transport Co.*, 485 F.2d 1240 (2d Cir. 1973), *aff'g*, 351 F.Supp. 702, 706 (S.D.N.Y. 1972).

¹² The following courts (in chronological order) came to the same conclusion prior to *Noel*: *Choy v. Pan American Airways Co.*, 1941 Am. Maritime Cas. 483 (S.D.N.Y. 1941); *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup.Ct. 1943), *aff'd*, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dept.), *aff'd*, 293 N.Y. 878 (1944), *cert. denied*, 324 U.S. 882 (1945); and *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954).

¹³ Ordinarily, conflict of a single decision of a Court of Appeals with all other reported authority might not render the invoking of certiorari jurisdiction compelling, but the considerable influence and general acceptance of the Second Circuit's earlier decision in *Noel* make it likely that its new decision will have a substantial destabilizing effect on the law in this area.

¹⁴ See, *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 n.2 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977);

Thus, the majority decision of the court below is bound to have a dramatic impact on what has heretofore been a well settled area of the law. In a stroke, this decision creates conflicts among the Circuits which previously did not exist as to the meaning and effect to be given to an important substantive provision of a treaty of the United States. In discussing the certiorari jurisdiction of the Court, Chief Justice Vinson has stated:

The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States . . .

Address of Chief Justice Vinson before the American Bar Association (September 7, 1949), 69 S.Ct. v-vi (1949). By their decision, the majority of the court below has triggered each of these concerns.

First, the decision of the court below now has created a conflict among the Circuits where none existed before. Second, the decision now has thrown into substantial uncertainty the uniform interpretation of an important substantive provision a treaty of the United States which had prevailed for some 45 years. As the Court of Appeals for the Fifth Circuit has stated with regard to the Warsaw Convention:

Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977); *Martinez Hernandez v. Air France*, 545 F.2d 279, 281 n.1 (1st Cir. 1976), *cert. denied* 430 U.S. 950 (1977); *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1243 (S.D.N.Y. 1975); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974); *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367 (Va.), *cert. denied*, 409 U.S. 878 (1972); *Notarian v. Trans World Airlines, Inc.*, 244 F.Supp. 874, 877 (W.D. Pa. 1965); *Winsor v. United Air Lines, Inc.*, 159 F.Supp. 856 (D.Del. 1958); *Fernandez v. Linea Aeropostal Venezolana*, 156 F.Supp. 94 (S.D.N.Y. 1957).

A multilateral treaty is rather like a "uniform law" within the United States. The Court has an obligation to keep interpretation as uniform as possible.

Block v. Compagnie National Air France, 386 F.2d 323 at 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

The majority decision of the Court below presents an important matter which calls for the exercise of certiorari jurisdiction.

We granted certiorari because the cases involve important rights asserted in reliance upon federal treaty obligations.

Kolovrat v. Oregon, 366 U.S. 187 at 191 (1961).

2. The majority of the Court below appears to disregard or reject the interpretation placed upon Article 17 of the Warsaw Convention by the Executive Branch of the Government, expressed at the time when the United States adhered to the treaty in 1934. Such a course seems not only suspect, but perhaps even beyond the court's power. Judge Van Graafeiland, in his dissenting opinion below, stated this point well:

The United States Senate is presently debating the wisdom of a proposed Panama Canal treaty, by which Panama will be given control of the Canal but certain rights will be reserved to the United States. One of the main concerns of those opposing ratification of the treaty is whether they can rely upon the interpretation of its provisions given them by the executive branch of our government. Opinions such as the one this Court now hands down demonstrate that their concern may not be ill-founded.

In 1934, when Secretary of State Cordell Hull sent the Warsaw Convention to President Roosevelt for

transmission to the Senate, he wrote that the effect of Article 17 was to "create a presumption of liability." We may assume, I believe, that the Senate relied upon the Secretary of State's assurances. Without question, the courts have done so. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954); *Ross v. Pan American Airways, Inc.*, 299 N.Y. 88, 97-98 (1949). In *Noel* we said:

Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. As one authority has stated, the purpose of the Convention was only "to effect a uniformity of procedure and remedies." Orr, *The Warsaw Convention*, 31 Va. L. Rev. 423 (1945); see also Comment, *Air Passenger Deaths*, 41 Corn. L.Q. 243, 255-60 (1956); Fixel, *The Law of Aviation*, §23 (1948).

247 F.2d at 679 (footnote omitted).

572 F.2d at 919-20; Appendix 17a-18a.

The Court should review the judgment of the court below because it *does* ignore or eschew the expressed view of the Executive Branch as to the interpretation of a treaty to which the Senate, accepting that view, gave its advice and consent to ratification of adherence.

3. Thousands of cases are filed each year in the United States based on claims arising out of international trans-

portation by air governed by the Warsaw Convention. The court below now has provided a federal forum for such cases by including these claims within the federal question jurisdiction of the District Courts of the United States. 28 U.S.C. §1331.¹⁵ In an effort to justify this vast expansion of federal question jurisdiction, the majority decision of the Court below gave as one¹⁶ of its principal reasons for overruling *Noel*:

One factor which makes federal jurisdiction peculiarly appropriate in large air crash cases was not present at the time *Komlos* and *Noel* were decided. Section 1407 of 28 U.S.C., enacted by Pub.L. No. 90-296, 90th Cong., 2d Sess., 82 Stat. 109 (April 29, 1968), created the Judicial Panel on Multidistrict Litigation, and authorized the creation of the procedures found in the *Manual for Complex Litigation*. These procedures,

¹⁵ In this regard it is important to note that this newly created cause of action for wrongful death has none of the attributes usually accompanying such a cause of action. For example, the Convention does not prescribe the persons entitled to bring suit. 49 Stat. 3020. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Zousmer v. Canadian Pacific Air Lines, Ltd.*, 307 F.Supp. 892 (S.D.N.Y. 1969). Nor does it define the items of damage which are recoverable. See, *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). All of these matters would require a district court not only to apply foreign law with which it is not familiar, but also to resolve numerous choice of law problems in determining what, if any, foreign law should apply.

¹⁶ The other primary basis was the majority's reliance on an article by G. Nathan Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217, 323 (1959). Frankly, it is difficult to understand this reliance since the Calkins' article: (1) presented no new evidence not before the court in *Noel* and, indeed, the Senate of 1934; and (2) is outdated as to the most convincing argument contained therein for the creation of a cause of action—that otherwise United States courts would strictly apply a *lex loci delictus* rule in foreign accidents preventing American recoveries. See footnote 7 of the dissenting opinion below, 572 F.2d at 923; Appendix 7a.

such as consolidation and assignment to one expert judge, can—by reducing expenses and expediting dispositions—benefit all parties to air disaster actions, in which the plaintiff/victims may come from many different parts of the country. Obviously, these procedures are unavailable among the courts of the several states.

572 F.2d at 919; Appendix 16a. While there can be little doubt that multidistrict litigation handling is most efficient in dealing with large air crash disasters, this argument is more correctly addressed to the Congress than it is to the reinterpretation of a treaty adhered to by the United States for some 35 years prior to the enactment of the Multidistrict Litigation Act.

In any case, such an argument of expediency must be rejected as it was in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972) where the Court stated:

It may be . . . that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases . . . If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.

409 U.S. at 273-74.

The majority below disclaimed any serious consequences from its decision with regard to increasing the number of cases which may be brought in federal courts:

Finally, we do not anticipate any large increase in the volume of federal litigation as a result of our holding. Most cases will fall under 28 U.S.C. §1332, as they do today; only when plaintiffs and defendants are all aliens, but the United States is a nation with treaty jurisdiction, will it be necessary to invoke 28 U.S.C. §1331.

572 F.2d at 919; Appendix 16a.

Approximately 12 days before the decision below, the House of Representatives passed H.R. 9622, 95th Cong. 2d Sess. This bill would abolish diversity jurisdiction between citizens, limit diversity jurisdiction to actions between citizens and aliens only, and abolish the jurisdictional amount in federal question cases.¹⁷ It is difficult to imagine a decision having greater impact on the jurisdiction of the federal courts than that of the majority below if the House bill becomes law. First, the immediate result of this decision is to provide federal question jurisdiction to controversies between aliens arising out of international aviation accidents at the same time that Congress is proposing to limit access of United States citizens to the federal courts in cases involving domestic aviation accidents.

Second, with the abolition of the jurisdictional amount in federal question cases (a provision which pending bills share), the majority decision of the court below will provide federal forums (whether by original filing or removal) for thousands of new cases each year. Many of these cases involve treaty limited recoveries (e.g. baggage and cargo loss or damage claims limited to \$20 per kilogram) that would, in effect, make the federal courts "small

¹⁷ H.R. 9622 is one of three bills being considered by the Senate. One of the other two bills (S. 2398) is identical to H.R. 9622. The remaining bill abolishes the jurisdictional amount in federal question cases, but limits diversity jurisdiction by preventing a plaintiff from bringing suit in the federal court in his home state.

claims courts". See, e.g., *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964).

It is significant that in the hearings before both the House of Representatives and the Senate on the proposed bills, the abolition of the jurisdictional amount in federal question cases was uncontroversial because the evidence indicated that few, if any, federal question cases were not already specifically exempted from the jurisdictional amount by specific legislation. See, e.g., 28 U.S.C. §§1337, 1983 *et alia*. In fact, no one mentioned the possibility of cases arising directly from a treaty, let alone the possibility of thousands of such cases, most of which would involve very small claims. See, Testimony of Lucas A. Powe in HEARINGS BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 95th Cong., 1st Sess., Serial No. 21, pp. 261-63. See also, Testimony of Charles Alan Wright, *id.* at 228-29.

Thus, by its decision, the majority of the court below has undermined an important aspect or reason underlying the passage of a bill by the House of Representatives which would substantially limit the jurisdiction of the District Courts. The irony, of course, is that it is the Congress which is entrusted with the duty to define federal question jurisdiction. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). Not only has the majority decision of the court below substantially increased the scope of federal question jurisdiction, but it did so at the very time when Congress is considering enacting legislation fundamentally altering such jurisdiction *on the basis that the effect of the alteration would not significantly affect the workload of the federal courts*. In his dissenting opinion below, Circuit Judge Van Graafeiland stated:

[T]he majority draws within the ever-widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.

572 F.2d at 920; Appendix 18a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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Of Counsel:

CONDON & FORSYTH
RONALD E. PACE
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New York, New York
July 24, 1978

Certificate of Service

I hereby certify that I have, this 24th day of July, 1978, served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit upon respondents by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

MENDES & MOUNT
3 Park Avenue
40th Floor
New York, New York 10016

RONALD L. M. GOLDMAN & ASSOCIATES
13737 Fiji Way
Marina del Rey, California 90291

KREINDLER & KREINDLER
99 Park Ave.
New York, New York 10016

July 24, 1978

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

APPENDIX

**Order of the Second Circuit Panel Denying the
Petition for Rehearing**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-7201

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of April, one thousand nine hundred and seventy-eight.

Present:

HON. WILFRED FEINBERG,

HON. J. EDWARD LUMBARD,

HON. ELLSWORTH VAN GRAAFEILAND,

Circuit Judges.

ABRAHAM BENJAMINS, as Personal Representative of the
Estate of Hilde Benjamins, deceased,

Plaintiff-Appellant,

v.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY
AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendant-Appellees.

A petition for a rehearing having been filed herein by counsel for the defendant-appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

Date:

**Order of the Second Circuit Denying
Rehearing in Banc**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-7201

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of April, one thousand nine hundred and seventy-eight.

ABRAHAM BENJAMINS, as Personal Representative of the
Estate of Hilde Benjamins, deceased,

Plaintiff-Appellant,

v.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY
AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge
Irving R. Kaufman

Date:

Opinion of Court of Appeals

Reported at 572 F.2d 913 (1978)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 111

(Argued October 21, 1977 Decided March 6, 1978.)

Docket No. 77-7201

ABRAHAM BENJAMINS, as Personal Representative of the
Estate of Hilde Benjamins, Deceased,

Plaintiff-Appellant,

v.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY
AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,
Defendants-Appellees.

Before:

LUMBARD, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

RONALD L. M. GOLDMAN, Marina del Rey, Cal.
(Ronald L. M. Goldman & Associates, Marina del Rey, Cal., on brief), for plaintiff-appellant.

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GEORGE N. TOMPKINS, JR., New York City (Condon & Forsyth, Ronald E. Pace and Michael J. Holland, New York City, on brief), for Defendant-appellee British European Airways.

JAMES J. FINNERTY, JR., New York City (Mendes & Mount, New York City, on brief), for Defendant-appellee Hawker Siddeley Aviation, Ltd.

LUMBARD, Circuit Judge:

This appeal, arising out of the death of Hilde Benjamins in the air crash disaster at Staines, England, on June 18, 1972, once again presents us with the much-discussed question whether the Warsaw Convention¹ creates a cause of action. The District Court for the Eastern District dismissed the complaint herein, believing itself bound by our prior decisions² to answer that question in the negative. We reverse.

I

On June 18, 1972, a Trident 1 Jet Aircraft—designed and manufactured by Hawker Siddeley Aviation, Ltd.

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (concluded Oct. 12, 1929; adhered to by United States June 27, 1934) [hereinafter referred to as "Convention"; "Article(s)" means Article(s) of the Convention].

² Judge Weinstein cited *Husserl v. Swiss Air Transport Co.*, 485 F.2d 1240 (2d Cir. 1973), *aff'g* 351 F. Supp. 702 (S.D.N.Y. 1972); *Noel v. Línea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); and *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954). He indicated, however, that he thought the matter not free from doubt, and commended the question to our careful attention.

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["HSA"], and owned and operated by British European Airways ["BEA"]—took off for Brussels from London's Heathrow Airport. Soon thereafter, the plane stalled and crashed into a field, killing all 112 passengers, including Hilde Benjamins. Hilde Benjamins was survived by her husband Abraham; both were Dutch citizens permanently residing in California. BEA and HSA are British corporations with their principal places of business in the United Kingdom. The ticket on which Hilde Benjamins was travelling had been purchased in Los Angeles, and clearly provided "international transportation" within the meaning of Article 1 of the Convention. Therefore, since the United States and the United Kingdom are both High Contracting Parties, the Convention is applicable to this proceeding.

This suit for wrongful death and baggage loss was brought in April of 1974 in the Eastern District of New York by Abraham Benjamins, as representative of his widow's estate, on behalf of himself and the children of the marriage. Benjamins' action was consolidated with a number of others arising out of the same incident, and assigned to Judge Weinstein. *In re Air Crash Disaster at Staines, England*, MDL No. 147 (J.P.M.D.L.). The major allegations in the complaint invoked Articles 17 and 18 of the Convention. These read, in relevant part, as follows:

Article 17. The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

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Article 18(1). The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

Dismissed once for lack of subject matter jurisdiction—only diversity was originally alleged—the complaint was amended to invoke 28 U.S.C. §§ 1331 and 1350 as well.³ After both sides had submitted briefs, Judge Weinstein ruled that this suit did not “arise” under a treaty of the United States, as § 1331 requires; he relied on Second Circuit precedent indicating that the Convention does not create a cause of action, but only establishes conditions for a cause of action created by domestic law. This appeal followed.

II

The first question we address⁴ is whether any court in this country has jurisdiction in the “international or treaty sense.” *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971). Only then may we consider “the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case—jurisdiction in the domestic law sense.” *Id.*

Jurisdiction in the treaty sense is determined by Article 28(1) of the Convention, which provides that

[a]n action for damages must be brought, at the option of the plaintiff, in the territory of one of the High

³ Jurisdiction over HSA is alleged under principles of pendent jurisdiction.

⁴ Personal jurisdiction is not an issue in this case, as each defendant has submitted to the *in personam* jurisdiction of the court.

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Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

The third alternative of Article 28(1) is satisfied in this case: the ticket which constituted the contract of carriage was purchased in Los Angeles, through BEA. The fourth alternative appears also to fit, as decedent's round-trip ticket provided for an ultimate destination in the United States.

Nonetheless, courts in the United States, and particularly the federal courts, are not the only possible forum for Abraham Benjamins. The courts of England are open to his suit—permitted by the first and second alternatives of Article 28(1)—as are the state courts of California.⁵ Plaintiff's burden is not met by a showing that Article 28(1) permits some court of this country to hear his complaint; he must further show that some jurisdictional statute permits a federal court to do so.

III

The two bases for federal jurisdiction pleaded in Benjamins' amended complaint are the Alien Tort Claims Act, 28 U.S.C. § 1350,⁶ and a general federal question “arising under” a treaty.

⁵ *Smith v. Canadian Pacific Airways, Ltd.*, *supra*, indicates that venue is no concern of Article 28(1), 452 F.2d at 800-01. It answers only the question “whether suit may be brought at all in the courts of the United States,” whether state or federal and regardless of location. *Id.* at 800 n. 3.

⁶ The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

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The Alien Tort Claims Act does not provide a basis for jurisdiction over this action. Without having to discuss the question of whether the wrongful death action against a carrier is essentially one in tort or in contract, we are satisfied that Benjamins' complaint alleges a violation of neither the law of nations nor any treaty of the United States.

The Convention itself does not seek to outlaw accidents, crashes and other events causing death, injury or property loss. Rather, it sets forth the terms under which victims of such events may recover their damages. Airlines do not "violate" the Convention when they crash—even if their negligence was 'wilful'—but only when they fail to compensate victims who are adjudged to be appropriate recipients of damages. The fact that a claimant must bring an action to recover does not constitute a violation by the carrier of its obligations.

Nor do the acts alleged violate the law of nations under the standards we set in *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975): "a violation . . . of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*." See *Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976). This law does not include a prohibition of air crashes.

IV

Accordingly, we must determine whether any of the causes of action pleaded by Benjamins "arise under" the Warsaw Convention. It is true that in the past we have said that the Warsaw Convention does not create a cause of action. We believe, however, that a re-examination of the question requires a different answer.

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A

At the time the United States adhered to the Convention, it seemed obvious to all that the Convention created causes of action for wrongful death or personal injury (Article 17), and for damage to baggage (Article 18). One court went so far as to say, "If the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do." *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951), *aff'd mem.*, 281 App.Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953).⁷

The view that the Convention does not create a cause of action is, in large part, attributable to two cases we decided in the 1950s, *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436 (2d Cir. 1953), *rev'g on other grounds*, 111 F. Supp. 393 (S.D.N.Y. 1952), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954), and *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957):

The Second Circuit had spoken twice, the Supreme Court had denied certiorari, and in all subsequent American Warsaw cases it was either assumed or decided that the claim must be founded on some law other than the Convention itself.

Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 519 (1967).

The analysis on which this structure of holding rests is to be found in Judge Leibell's opinion for the district court in *Komlos*. In determining whether a cause of action had been assigned to an insurer or remained the property

⁷ But see *Wyman v. Pan American Airways*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup.Ct. 1943), *aff'd*, 267 App.Div. 947, 48 N.Y.S.2d 459 (1st Dept.), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785, *cert. denied*, 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432 (1944).

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of an estate, Judge Leibell held that the action envisioned by Article 17 was one created by domestic law, except in cases where the forum provided no analogous action. 111 F.Supp. at 401-02.

Judge Leibell relied heavily on a letter sent by Secretary of State Cordell Hull to President Roosevelt on March 31, 1934, recommending adherence to the Convention. In the course of a lengthy discussion of the benefits of adherence, Hull wrote:

The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

[1934] U.S.Av.Rep. 240, 243. This was seen by Judge Leibell as clear evidence that the Convention created only presumptions, not new causes of action.

In reversing Judge Leibell on another issue, we did not refer to the portion of his opinion discussed above, or, indeed, even mention the Warsaw Convention. 209 F.2d at 438-40. Nonetheless, in *Noel*, we followed our opinion in *Komlos*, which, we said, had "impliedly agreed" with Judge Leibell. 247 F.2d at 679. Though most of our opinion in *Noel* was devoted to disapproving Judge Leibell's suggestion that Article 17 might create a cause of action for wrongful death where domestic law did not, it is apparent that—however founded—*Noel*, as the law of this circuit, stands for the proposition that the Convention does not create a cause of action. See, e.g., *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1251-52 (S.D.N.Y. 1975).

Recently, an inconsistency has developed between this rule and another line of Warsaw cases we have decided.

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For example, in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), cert. denied, — U.S. —, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977), we indicated—without addressing the question in the instant case—that "the Convention was intended to act as an international uniform law," *id.* at 1083, and that the substantive law of the Convention was binding on the forum, *id.* at 1092. The time has come to examine the question whether our view of the Convention as an internationally binding body of uniform air law permits us any longer to deny that a cause of action may be founded on the Convention itself, rather than on any domestic law.

B

1. The minutes and documents of the meetings, held in 1925 and 1929, which led to the adoption of the Convention do not specifically indicate whether the parties contemplated that an action for damages under the Convention would arise under the terms of the treaty or those of domestic law.⁸ What is made quite clear is the extent to which the delegates were concerned with creating a uniform law to govern air crashes, with absolutely no reference to any national law (except for the questions of

⁸ Some commentators, at least, have attributed this to its being taken for granted that the Convention itself supplied the cause of action. E.g., Lowenfeld & Mendelsohn, *supra*, 80 Harv.L.Rev. at 517. A stronger statement comes from the Chairman of the United States Delegation to the Hague Conference to Amend the Warsaw Convention, G. Nathan Calkins:

[T]he author is convinced that the draftsmen of the Convention intended to create a right-of-action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today.

Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Comm. 217, 218 (1959).

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standing to sue for wrongful death, effects of contributory negligence and procedural matters; see Articles 21, 24(2), 28(2)).

The delegates were concerned lest major air crash cases be brought before courts of nations whose courts were not (according to current Western standards) well organized, nor whose substantive law (according to the same standards) progressive. To avoid the "prospect of a jungle-like chaos," *Reed v. Wiser, supra*, 555 F.2d at 1092, the Convention laid down rules that were to be universally applicable. While it is not literally inconsistent with this universal applicability to insist that a would-be plaintiff first find an appropriate cause of action in the domestic law of a signatory authorized by Article 28 to hear his claim, it is inconsistent with its spirit.⁹ This inconsistency is an argument against the rule of *Noel* and *Komlos*, for the Convention is to be so construed as to further its purposes to the greatest extent possible, even if that entails rejecting a literal reading. *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966).

2. Other articles of the Convention throw some light on the question whether Articles 17 and 18 create causes of action. Article 30(3) provides that in the case of transportation by several carriers constituting one undivided transportation,

[a]s regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action

⁹ We note that, after *Noel*, not even the total lack of an appropriate cause of action at domestic law would permit an action to be founded on the Convention itself.

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against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. . . .

The most reasonable interpretation of this section is that Articles 18 and 30(3) create a cause of action against the appropriate carrier when more than one carrier is involved. See *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 305 (1st Cir.), *cert. denied*, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61 (1964): "Thus the Convention not only imposes liability on an air carrier for the loss of checked baggage but also gives a passenger whose baggage is lost a right of action to enforce that liability. Seth's action, therefore, seems clearly to be one arising under a treaty of the United States." There is no reason to believe that the Convention's effect is any different when only one carrier is involved.

Article 24 has been cited by proponents of both views of the Convention. In the French version—the only official version—the Article reads:

- (1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.
- (2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent. . . .

The unofficial translation reads:

- (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
- (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply

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The crucial phrases, of course, are "however founded" ("à quelque titre que ce soit"), and "conditions" ("conditions"). There is no internal evidence to indicate whether "however founded" was intended to refer to a number of possible domestic law sources or to a number of possible factual bases for the envisioned action.

As to "conditions," that term in English does imply that the source of the action must be sought elsewhere than the Convention, which supplies only conditions and limits. Nonetheless, there is some evidence for the view that the French has not been so translated here as to provide the best interpretation of the delegates' meaning, and that "basis" or "terms" would be a closer translation in this context of "conditions." Calkins, *supra*, 26 J. Air L. & Comm. at 225-26. The arguments as to Article 24 are not conclusive either way.

3. More compelling is the evidence of how other signatories of the Convention have interpreted its provisions. The clearest picture is found in other common-law jurisdictions. In the statute enacting the original 1929 Convention in the United Kingdom, it was provided that

[a]ny liability imposed by Article seventeen of the said [Warsaw Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law

Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4). When the Convention was reenacted as amended at the Hague in 1955, Carriage by Air Act, 1962, 9 & 10 Eliz. 2, c. 27, this language was omitted, but there is no indication

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that any change of substantive law was intended. No case law since 1962 has demonstrated that the source of carrier liability lies anywhere but in the Convention. *See also* Carriage by Air Act, 1939, 3 Geo. 6, c. 12 (Canada).

V

The fact that a proposition of law has been accepted for some twenty years is evidently a sign that circumspection is needed in seeking to overturn that proposition. We recognize that our holdings in *Komlos* and *Noel* have become the rule not of this circuit alone, but of others as well. *See, e.g., Maignie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977). Nonetheless, we are convinced that—in light of both the paucity of analysis that accompanied the creation of the rule and the strong arguments in favor of the opposite rule—the *Komlos/Noel* rule ought no longer to be followed.

We do not believe that the passing remark of Secretary Hull in a lengthy letter was intended to state the total of what Article 17 might provide; we do not see what there was about our decision in *Komlos* that constituted implicit agreement with Judge Leibell, and compelled the result in *Noel*; we do not find technical and disputable interpretations of the language of other articles of the Convention conclusive in determining this important question of policy.

We do, on the other hand, believe that the desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action. We do see that uniformity of development can better be achieved by making federal as well as state courts

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accessible to Convention litigation. We do find the opinions of our sister signatories to be entitled to considerable weight.

One factor which makes federal jurisdiction peculiarly appropriate in large air crash cases was not present at the time *Komlos* and *Noel* were decided. Section 1407 of 28 U.S.C., enacted by Pub.L.No. 90-296, 90th Cong., 2d Sess., 82 Stat. 109 (April 29, 1968), created the Judicial Panel on Multidistrict Litigation, and authorized the creation of the procedures found in the *Manual for Complex Litigation*. These procedures, such as consolidation and assignment to one expert judge, can—by reducing expenses and expediting dispositions—benefit all parties to air disaster actions, in which the plaintiff/victims may come from many different parts of the country. Obviously, these procedures are unavailable among the courts of the several states.

Finally, we do not anticipate any large increase in the volume of federal litigation as a result of our holding. Most cases will fall under 28 U.S.C. § 1332, as they do today; only when plaintiffs and defendants are all aliens, but the United States is a nation with treaty jurisdiction, will it be necessary to invoke 28 U.S.C. § 1331.

VI

Accordingly, we reverse Judge Weinstein's order of dismissal. We leave it to his discretion to determine, in a manner consistent with our opinion, which of Benjamins' causes of action he may decide and which, if any, he may not; in particular, we leave to him the question whether to take pendent jurisdiction over the claims against HSA.

Reversed and remanded for further proceedings consistent with our opinion.

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VAN GRAAFEILAND, *Circuit Judge*, dissenting:

The United States Senate is presently debating the wisdom of a proposed Panama Canal treaty, by which Panama will be given control of the Canal but certain rights will be reserved to the United States. One of the main concerns of those opposing ratification of the treaty is whether they can rely upon the interpretation of its provisions given them by the executive branch of our government. Opinions such as the one this Court now hands down demonstrate that their concern may not be ill-founded.

In 1934, when Secretary of State Cordell Hull sent the Warsaw Convention to President Roosevelt for transmission to the Senate, he wrote that the effect of Article 17 was to "create a presumption of liability." We may assume, I believe, that the Senate relied upon the Secretary of State's assurances. Without question, the courts have done so. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.) *cert. denied*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957); *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820, 75 S.Ct. 31, 99 L.Ed. 646 (1954); *Ross v. Pan American Airways, Inc.*, 299 N.Y. 88, 97-98 (1949). In *Noel* we said:

Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. As one authority has stated, the purpose of the Convention was only "to effect a uniformity of procedure and remedies." Orr, *The Warsaw Convention*, 31 Va.L.Rev. 423 (1945); see also Comment, *Air Passenger Deaths*,

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41 Corn.L.Q. 243, 255-60 (1956); Fixel, *The Law of Aviation*, § 23 (1948).

247 F.2d at 679 (footnote omitted).

Completely reversing our field, we now hold that Article 17 creates a cause of action for wrongful death. As justification for this turnabout, the majority relies in part upon the "paucity of analysis that accompanied the creation of the rule." I am at a disadvantage in challenging this statement, because Judge Lumbard, the writer of the majority opinion, also wrote *Noel*. However, I am satisfied that Judge Lumbard gave *Noel* the same careful and thoughtful consideration he gives to every case, and which he has given to this one. Moreover, I am convinced that the numerous courts who have adopted the reasoning of *Noel*, see, e.g., *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977), did not do so without their own thoughtful analysis of its merit. In short, I am constrained to conclude, as Judge Moore did when dissenting in *Lisi v. Alitalia—Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455, 88 S.Ct. 281, 19 L.Ed.2d 276 (1968), that the majority no longer approves of the terms of the Convention and therefore by judicial fiat has decided to rewrite it. In the process, the majority draws within the ever-widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.

A court should proceed cautiously when asked to overturn a well-settled doctrine of law. This is especially true in this case because a sensitive question concerning the scope of federal jurisdiction is involved. But even more importantly, circumspection is required here because

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amendments to the Warsaw Convention that may end this entire controversy are currently pending.

We have pointed out recently that "[t]he Warsaw Convention is not a treaty that has mouldered on the books. On the contrary it has had agonizing reappraisal by the Executive and Legislative branches. . . ." *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir.), *cert. denied*, — U.S. —, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977). One result of this reappraisal has been the Guatemala City Protocol to amend the Warsaw Convention.¹ The United States has signed the Protocol, and ratification is now pending before the Senate. Hearings have been held as recently as July, 1977.² The Protocol makes extensive revisions in the Convention's provisions concerning liability. See R. Boyle, *The Guatemala Protocol to the Warsaw Convention*, 6 Cal.W.Int'l L.J. 41 (1975). In particular, the Protocol amends Article 17 to impose absolute liability on the carrier. Some commentators have expressed the view that the amendments to Article 17, if ratified, will legislatively overrule the *Noel* decision. R. Boyle, *supra*, 6 Cal.W.Int'l L.J. at 74; Note, *The Guatemala City Protocol*, 5 N.Y.J.Int'l L. 313, 324-27 (1972). But whether or not the amendments will have that result is unimportant; the mere fact that they are pending is a clear indication that this matter is one which should be left to the coordinate branches of our Government, at least in the absence of some compelling reason. No such reason is presented by this case. Plaintiff can bring his

1 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol Done at the Hague on 28 September 1955, done at Guatemala City March 8, 1971.

2 Two related Protocols Done at Montreal on September 25, 1975: *Hearings on Ex. B, Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. (July 26, 1977).

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action in a number of other forums. Our continued adherence to *Noel* causes no injustice. Under these circumstances, I would decline to reconsider the question of whether Article 17 creates a cause of action.

Even if I were persuaded that a re-examination of *Noel* was appropriate at this time, I would not be convinced that it was incorrectly decided. Article 17 states that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . ." and the plain language of this article is the majority's strongest argument that the Convention created a right to sue. However, a close analysis of this section reveals that its meaning is not as clear as might appear on its face.

At the time the Convention was drafted it was generally accepted in this country that a cause of action for wrongful death could not be maintained in the absence of a specific statute authorizing such suit. See, e.g., *Aetna Life Insurance Co. v. Moses*, 287 U.S. 530, 539, 53 S.Ct. 231, 77 L.Ed. 477 (1933); *Salsedo v. Palmer*, 278 F. 92 (2d Cir. 1921). All American states have such statutes, but the statutes differ widely with respect to "the persons for whose benefit a death action may be maintained, and the measure, elements and distribution of damages recoverable." 1 S. Speiser, *Recovery for Wrongful Death* § 1.9 at 29 (2d ed. 1975) (footnotes omitted). Although the statutes take different approaches, they are alike in the fact that they all expressly deal with these crucial questions.³ Article 17 of the Convention, on the other hand, does not specify who are the beneficiaries of

³ The different wrongful death statutes in effect in the United States are collected in 2 S. Speiser, *supra*, appendix A, at 644-787. The statutes of the other countries in the world are found in *id.*, appendix B, at 789-859. The briefest survey of these statutes shows that virtually every one, whether domestic or foreign, specifies who are the beneficiaries of the wrongful death action and what type of damages may be recovered.

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the action, nor what types of damages may be recovered. Indeed, the Convention provides that an action for a passenger's death is brought "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." Article 24(2). Thus, Article 17 at best goes only half way towards creating a cause of action for wrongful death. See *Zousmer v. Canadian Pacific Air Lines, Ltd.*, 307 F. Supp. 892, 901 (S.D.N.Y. 1969).⁴ I am not persuaded that this legislatively created "liability", which designates neither the beneficiaries of the right of recovery nor the measure of their damages creates a cause of action. The phrase "the carrier shall be liable" had a different purpose, as becomes apparent when Article 17 is examined in the context of the entire Convention.

The purpose of Warsaw was "to effect a uniformity of procedure and remedies." *Noel*, 247 F.2d at 679 (quoting Orr, *The Warsaw Convention*, 31 Va.L.Rev. 423 (1945)). To accomplish this goal, the drafters could have created a single cause of action to be asserted wherever suit was brought for wrongful death in international air travel. Alternatively, the drafters could have created a set of conditions and limitations uniformly applicable to all the various causes of action created by local law of the countries around the world. The drafters' choice of the latter alternative is evidenced by Article 24, which provides that any action "however founded" may only be brought "subject to" the "conditions and limits set out in [the] conven-

⁴ In *Bauch v. United Instruments, Inc.*, 548 F.2d 452, 457 (3d Cir. 1976), an action brought under the Federal Aviation Act, the Court said "For an essential element of such a cause of action, express or implied, is injury resulting from such a statutory violation which has been inflicted upon the plaintiff in his capacity as a member of the protected class and which has caused him measurable damage."

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tion." *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1251-52 (S.D.N.Y.1975). Thus, no matter whether the action is founded in tort or contract, whether in domestic or foreign law, the limitations and conditions of the Convention will apply. *See Reed v. Wiser*, 555 F.2d at 1092.⁵

Within this structure, Article 17 plays an important role. The basic trade-off under Warsaw was that the carrier was given a limitation on liability while the claimant gained a simplified recovery procedure. *Hearings on Ex. B*, note 2 *supra*, at 11 (statement of L. Kamm). *See also Pierre v. Eastern Airlines*, 152 F.Supp. 486 (D.N.J. 1957). The claimant's task was simplified by shifting the burden of proof to the defendant. The manner in which the drafters shifted the burden is important. By stating that "the carrier shall be liable" in Article 17, the drafters created a presumption of liability which could then be rebutted under Article 20(1) by the carrier's proof that it was free from negligence. A. Lowenfeld & A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 519-22 (1967). The new burden of proof, like the limitation on liability, is applicable to any action "however founded." Viewed in this light, I think it entirely reasonable to conclude, as we did in *Noel*, that the phrase "the carrier shall be liable" does not itself create a right to sue, but merely

⁵ In *Reed*, after a comprehensive review of the Convention, we held that the term "carrier" as used therein included the carrier's employees, so that the Convention's limitation of liability provisions applied in an action brought against a pilot. We did not hold, however, that the Convention created a cause of action against the pilot. Instead, we pointed out that in some countries pilots may be held liable for damages under the common law doctrine of *res ipsa loquitur* and in other countries under the civil law doctrine of absolute liability. We carried out the intent of the Convention by limiting their liability without regard to the theory upon which it was based.

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conditions the cause of action generated by the underlying substantive law.

The majority finds a right of action in the language of Article 17 mainly because it believes that "the desirability of uniformity in international air law can best be recognized" in this way. Even were I to agree with this approach, I should not be sure that the majority opinion promotes uniformity. There is no reason to believe that the new right of action is exclusive.⁶ State and federal rights of action will co-exist and may be pleaded in the same case. Moreover, federal courts will be required to supply the elements missing in the Convention's "cause of action". Unless the federal courts develop a body of federal common law, they must look to other sources of law for these elements. They must look to local law to determine whether a plaintiff was guilty of contributory negligence, Article 21, whether his damage was caused by the carrier's wilful misconduct, Article 25, whether he has a right of recovery for wrongful death, and the measure of his damages, Article 24(2). There can be no uniformity here.

I fear that when my brothers discuss uniformity, they are really talking about federal jurisdiction. State courts handle Warsaw Convention matters as wisely and fairly as do federal courts and with greater knowledge of the state law that must be applied. I see no reason to upset

⁶ Although the majority does not expressly address the question, there is good reason to believe that the right is not exclusive. Certainly an exclusive right would be inconsistent with the "however founded" language in Article 24. Furthermore, Calkins, in the article upon which the majority relies, viewed the right as non-exclusive. J. Calkins, *The Cause of Action Under the Warsaw Convention* (parts I & II), 26 J. Air.L. & Com. 217 & 323, 327 (1959).

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a long-standing rule of law simply to give the plaintiff access to the federal courts.⁷

For the foregoing reasons, I respectfully dissent.

⁷ One reason given by Calkins for overruling Noel is no longer persuasive. One of his main concerns was that redress be available whenever an American was killed or injured in international air travel, and recognition of a created right of action would have ensured this. At the time Calkins wrote, it was possible that an American court, applying the traditional place-of-the-wrong conflicts rules, might be forced to apply the law of a country which did not have a right to action for wrongful death. However, dramatic changes in the conflict of laws rules in this country make such a result unlikely. See Lowenfeld & Mendelsohn, *supra*, 80 Harv.L.Rev. at 526-32. Indeed, the majority does not even mention this possibility when marshalling the arguments in favor of a "Conventional" cause of action.

Order of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DOCKET No. 74-C-590

ABRAHAM BENJAMINS, etc.,

vs.

BRITISH EUROPEAN AIRWAYS, et al.

It is, on this 17th day of March, 1977

ORDERED, that this action is hereby dismissed.

JULES B. WEINSTEIN

United States District Judge

Oral Decision of the District Court
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73 C 341
MDL No. 147
74 C 590

ABRAHAM BENJAMINS, as Personal Representative
of the Estate of Hilde Benjamins, deceased,

Plaintiffs

—against—

BRITISH EUROPEAN AIRWAYS,
HAWKER SIDDELEY AVIATION, LTD., and
HAWKER SIDDELEY GROUP, LTD.,

Defendants

United States Courthouse
Brooklyn, New York

February 23, 1977
10:00 o'clock A.M.

Before:

Honorable JACK B. WEINSTEIN,

U.S.D.J.

EMMANUEL KARR
Official Court Reporter

Oral Decision of the District Court

[2]

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*Oral Decision of the District Court***[3]**

(Following discussion between the parties, Judge Weinstein made the following statement.)

The Court: Plaintiff contends that the Warsaw Treaty establishes an independent right of action or a claim for relief as opposed to Federal jurisdiction.

There is a suggestion in *Smith versus Canadian Pacific Airways Limited*, 452 F. 2d, 798, a Second Circuit 1971 case, indicating a substantial basis for this contention.

See also G. Nathan Hawkins, Jr., "the Cause of Action Under the Warsaw Convention," 26 *Journal of Air Law and Commerce* 323 (1959).

There is also support for the position in the First Circuit, *Seth versus British Overseas Airways Corporation*, 329 F. 2d 202, First Circuit 1964.

This Court believes it is bound by the *Noel versus Linea Aeropostal Venezolana* 247 F. 2d 677, Second Circuit, 1957.

See also *Husserl versus Swiss Air Transport Co., Ltd.*, 351 Supp. 702, 706, a Southern District of New York 1972 case, affirmed without opinion essentially for the reasons set forth by Judge Tyler in a well-considered opinion, *Greca Husserl versus Swiss Air Transport Co.*, 485 F. 2d, 1240, a Second Circuit 1973 **[4]** case.

This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The Court has found no such full consideration and analysis in any of the Second Circuit decisions.

The case of *Abraham Benjamins, as Personal Representative of the Estate of Hilda Benjamins, Deceased*, is dismissed.

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